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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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11 UNITED STATES OF AMERICA,)

12 Plaintiff,)

13 vs.)

14 MARTIN ALVAREZ-RODRIGUEZ,)

15 Defendant.)
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2:06-cr-155-PMP-GWF

GOVERNMENT'S APPLICATION
FOR ORDER DEEMING ATTORNEY
CLIENT PRIVILEGE WAIVED

17 The United States of America, by and through DANIEL G. BOGDEN, United States
18 Attorney, and ROBERT L. ELLMAN, Assistant United States Attorney, respectfully requests
19 that this Court enter an order waiving the attorney-client privilege in 2:06-cr-155-PMP-GWF
20 with regard to Donald Green, Esq., Jose Pallares, Esq. and David T. Brown, Esq. This
21 application does not waive the Government's right to assert that Defendant's motion under
22 28 U.S.C. § 2255 is time barred under 28 U.S.C. ¶ 6, or that his claims are otherwise barred.

23 This order is sought for the following reasons:

24 1. The defendant, MARTIN ALVAREZ-RODRIGUEZ, has filed a motion pursuant
25 to 28 U.S.C. § 2255 to vacate, set aside or correct sentence by a person in federal custody
26 (the 2255 Motion) in the above-captioned case. See Doc. # 202. On November 17, 2011,

1 this Court ordered the government to respond to the 2255 Motion by December 20, 2011.
2 See Doc. # 205.

3 2. Defendant was indicted on May 10, 2006. Doc. # 1. On November 6, 2008,
4 a jury found Defendant guilty on five charges brought in a second superseding indictment:
5 one count of conspiring to distribute methamphetamine, two counts of possession with intent
6 to distribute methamphetamine, one count of felon-in-possession of a firearm, and one count
7 of illegal-alien-in-possession of a firearm. Doc. # 75, 127, 131, 132. Defendant received a
8 life sentence on Counts 1, 2 and 3. Doc. # 151, 154.

9 3. The docket reflects that defendant was represented successively by three
10 retained attorneys during the course of pretrial proceedings: David T. Brown, Esq., who
11 represented Defendant from arraignment on the first indictment on May 19, 2006 until July
12 7, 2006 (see Doc. # 6, 15), Jose Pallares, Esq., who represented Defendant from July 7,
13 2006 until November 3, 2006 (see Doc. # 14, 15, 37, 39); and Donald Green, Esq., who
14 represented Defendant from the arraignment on the first superseding indictment through
15 sentencing in June, 2009 (see doc. # 37, 39, 151).

16 4. Defendant unsuccessfully appealed. Doc. # 152, 196.

17 5. Defendant filed the 2255 Motion on October 24, 2011. Doc. # 202. The 2255
18 Motion alleges ineffective assistance of counsel on seven of the nine grounds presented.

19 6. Under Ground One of the 2255 Motion, Defendant alleges that the Government
20 made two plea offers; that Mr. Green did not advise Defendant of the possibility of a
21 mandatory life sentence upon conviction; and that if Defendant had known of the possible
22 mandatory life sentence, he would have accepted either one of the Government's plea
23 offers. Doc. # 202 at 5; see also doc. # 202 at 11-12 (supporting memorandum), 25 (affidavit
24 in support of motion).

25 7. The claim set forth in Ground One rests on the premise that Defendant did not
26 know that he faced the possibility of a mandatory life sentence upon conviction. While it may

1 yet be possible to establish from record materials that Defendant had actual knowledge of
2 that fact, undersigned counsel has not been able to do as of today, and the response to the
3 2255 Motion is due in two weeks. While Defendant couches his claim in Ground One as
4 ineffective assistance by Mr. Green, if any of his three successively retained attorneys
5 informed him of the possibility of a mandatory life sentence, the ineffectiveness claim would
6 fail as factually unsupportable. Accordingly, access to information from Mr. Brown, Mr.
7 Pallares and Mr. Green is necessary in order to appropriately respond to the factual basis
8 of the allegation contained within Ground One of the 2255 Motion.

9 8. Ground Two of the 2255 Motion alleges ineffective assistance of counsel based
10 on “failure to investigate/challenge the arrest search and seizure and the sufficiency of
11 information in the warrant and affidavit.” Doc. # 202 at 6; see also doc. # 202 at 13-14.
12 Ineffectiveness claims require a defendant to establish both deficient performance by
13 counsel as well as resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).
14 Setting aside the merits of a potential challenge to the arrest, search and seizure, particularly
15 in light of the fact that Mr. Pallares moved to suppress evidence and Mr. Green litigated that
16 motion in an evidentiary hearing (see doc. # 23, 60), access to information from Mr. Brown,
17 Mr. Pallares and Mr. Green is necessary in order to address the performance prong of the
18 *Strickland* inquiry on Ground Two.

19 9. Ground Three of the 2255 Motion alleges ineffective assistance of counsel
20 based on “failure to inform and explain to Alvarez about his sole right to testify in his own
21 defense.” Doc. # 202 at 6; see also doc. # 202 at 14-16. The claim set forth in Ground
22 Three would necessarily fail as factually unsupportable if any of his counsel informed him
23 of his right to testify at trial. Access to information from Mr. Brown, Mr. Pallares and Mr.
24 Green is necessary in order to address the factual basis of this claim.

25 10. Grounds Four, Five and Six of the 2255 Motion allege ineffective assistance
26 of counsel based on failure to make objections or proffer certain evidence during the jury

1 trial. Doc. # 202 at 7, 16-18. Setting aside the potential merits of such a claim, access to
2 information from Mr. Green is necessary in order to address both the factual bases of these
3 claims and the performance prong of the *Strickland* inquiry.

4 11. Ground Seven of the 2255 Motion alleges ineffective assistance of counsel
5 based on “failure to timely provide discovery and apprise Alvarez of the charges against
6 him.” Doc. # 202 at 18. Defendant has limited the allegation to Mr. Green. *Id.* Setting aside
7 the potential merits of such a claim, access to information from Mr. Green is necessary in
8 order to address the factual basis of this claim.

9 12. The government requests this Court to issue an order wherein the attorney-
10 client privilege in 2:06-cr-155-PMP-GWF is deemed waived for the purposes of this
11 proceeding as to (1) information Mr. Green, Mr. Brown and Mr. Pallares can provide relevant
12 to the allegations set forth in Grounds One, Two and Three of the 2255 Motion; and (2)
13 information Mr. Green can provide relevant to the allegations set forth in Grounds Four, Five,
14 Six and Seven of the 2255 Motion.

15 13. The voluntary disclosure by Defendant of privileged attorney communications
16 constitute waiver of the privilege as to all other such communications on the same subject.
17 *Weil v. Investment/Indicators, Research & Management*, 647 F.2d 18, 24 (9th Cir. 1981);
18 *Clady v. County of Los Angeles*, 770 F.2d 1421, 1433 (9th Cir. 1985).

19 Even when a party does not explicitly disclose the content of an attorney-
20 client communication, he may waive the privilege implicitly. A person
21 cannot always claim that he relied on counsel, while protecting what was
22 said between them from disclosure. As we have said, “The privilege which
23 protects attorney-client communications may not be used both as a sword
24 and a shield. Where a party raises a claim which in fairness requires
25 disclosure of the protected communication, the privilege may be implicitly
26 waived.” (citations omitted).

24 *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997).

25 **WHEREFORE**, based on the foregoing, the government respectfully requests that
26 the attorney-client privilege in 2:06-cr-155-PMP-GWF be deemed waived as to all

1 communication, information and work product relevant to the claims set forth in Grounds One
2 through Seven of the 2255 Motion; that Mr. Brown, Mr. Pallares and Mr. Green provide the
3 government with affidavits, as well as all materials and information, addressing Defendant's
4 allegations as set forth in Grounds One through Seven of the 2255 Motion; and that the due
5 date for responding to the 2255 Motion be reset to a date 30 days following receipt by the
6 Government of all three of the aforementioned affidavits.

7 **DATED:** this 6th day of December, 2011.

8 DANIEL G. BOGDEN
9 United States Attorney

10 /s/ Robert L. Ellman
11 ROBERT L. ELLMAN
12 Assistant United States Attorney
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served via first-class mail on Martin Alvarez-Rodriguez, David T. Brown, Esq., Jose Pallares, Esq., and Donald Green, Esq., at the following addresses, on this 6th day of December, 2011:

Martin Alvarez-Rodriguez, 40855-048
USP Atwater
U.S. Penitentiary
P.O. Box 019001
Atwater, CA 95301

David T. Brown, Esq.
Brown, Brown & Premsrut
520 S. Fourth St., Second Floor
Las Vegas, NV 89101

Jose Pallares, Esq.
1212 S. Casino Center Blvd.
Las Vegas, NV 89104

Donald Green, Esq.
4760 S. Pecos Rd. # 103
Las Vegas, NV 89121

/s/ Terrie Murray
TERRIE MURRAY
Legal Assistant

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 **-oOo-**
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5 UNITED STATES OF AMERICA,)
6 Plaintiff,) 2:06-cr-155-PMP-GWF
7))
8 vs.))
9 MARTIN ALVAREZ-RODRIGUEZ,) **ORDER**
10 Defendant.)
11 _____))

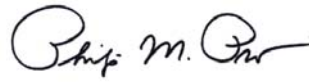
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13 Based upon the pending application of the Government, and good cause appearing,

14 **IT IS HEREBY ORDERED** that the attorney-client privilege in
15 2:06-cr-155-PMP-GWF between the defendant and David T. Brown, Esq., between the
16 defendant and Jose Pallares, Esq., and between the defendant and Donald Green, Esq.,
17 shall be deemed waived as to all matters relating to Grounds One through Seven of the
18 Motion Pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence By a Person
19 in Federal Custody (the 2255 Motion), filed on October 24, 2011 in the above-captioned
20 case. Mr. Brown, Mr. Pallares and Mr. Green shall each, within 30 days of this order,
21 provide the government with an affidavit concerning all information known by each of them
22 relevant to the allegations made in Grounds One through Seven of 2255 Motion. Further,
23 Mr. Brown, Mr. Pallares and Mr. Green may communicate with government counsel and
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1 provide supporting documentation regarding the information known to them as it relates to
2 Grounds One through Seven of the 2255 Motion.

3 The United States shall file its response to the 2255 Motion no later than 30 days
4 after receiving all of the affidavits referenced in this Order.

5 **DATED:** this _ 12th day of December, 2011.

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UNITED STATES DISTRICT JUDGE